Supreme Court, U.S.
FILED
NOV 15 1996
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No. 96-623

In The

Supreme Court of the United States

October Term, 1996

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Masakazu Yamaguchi, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estate of Makoto Okai and Yooko Okai, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS

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Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. Sec. 1502. Also known as "The Warsaw Treaty." 3

REPLY BRIEF OF PETITIONERS

The Opposition to the Petition ("Opp.") ignores Petitioners' legitimate argument that a general maritime law survival action exists which may be brought co-incident with a wrongful death action under DOHSA.[1] Instead of addressing Petitioner's argument, Korean Air Lines Co., Ltd. ("KAL") attempts to convince this Court to address the issues which it (KAL) wants addressed. It does not really oppose the request for certiorari but wants to align the issues to KAL's definitions of what they are, notwithstanding that KAL failed to cross-petition for writ of certiorari. Respondent argues that the Court should grant the Petition in order to resolve an alleged conflict "as to the proper application and effect of the intervening decision of the Court in *Zicherman*[2] on the recoverability of non-pecuniary damages for pain and suffering under DOHSA." Opp. at 15. However, *Zicherman* only addressed some issues relating to wrongful death remedies under DOHSA. The Petition, on the other hand, challenges the court below as erroneously expanding *Zicherman* to encompass non-wrongful death remedies and to preclude a general maritime survival cause of action for predeath pain and suffering, in direct conflict with the First, Fifth, and Eighth Circuits. Petition at 8-9. The Petition notes that the survival cause of action is different and independent of any wrongful death statute and provides remedies that are different not only in kind (predeath pain and suffering rather than family members' losses)

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[1] Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*

[2] *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996).

but in applicable beneficiaries (the estate of the decedent instead of surviving family members). The Respondent ignores this issue and focuses on the alleged conflict between the court below and the Sixth Circuit in *Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996) and the District of Columbia Circuit in *Forman v. Korean Air Lines*, 84 F.3d 446 (D.C. Cir. 1996), *petition for cert. filed sub nom., Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed October 3, 1996). No such conflict exists as those cases were decided on procedural grounds. KAL should be precluded from modifying the Petition's issues in its misnamed "Opposition" and the Petition should be granted on the basis of the issues as framed therein.

ARGUMENT

I. KAL Does Not Really Oppose the Petition

KAL does not genuinely oppose the Petition (*see*, Opp. at 7) but wants the issues re-cast on different grounds than as framed in the Petition. To that end, it ignores the issue whether there exists a survival action for predeath pain and suffering under general maritime law developed under an analysis akin to the recognition of a general maritime law death action pursuant to *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). KAL ignores the argument because it cannot deny that the Court has several times either specifically acknowledged (*see, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n. 2 (1974), *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 625 n. 7 (1996)) or strongly implied (*see, Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990)) that a survival cause

of action for predeath pain and suffering is a thing apart from a wrongful death cause of action. The argument Petitioner makes, which Respondent ignores, is that, if Article 17 of the Warsaw Convention[3] is merely a pass-through, or *Zicherman* dictates, the courts must apply whatever law would ordinarily be utilized. If there is a general maritime survival cause of action for predeath pain and suffering, as Petitioner urges the Court to acknowledge, then that remedy is available through Article 17 independent of the wrongful death remedies available under DOHSA through Article 17. Thus, Respondent's phraseology of whether *Zicherman* precludes pain and suffering damages under DOHSA (Opp. at 15) misstates the Questions Presented for Review. The Writ should issue on the questions as presented.

II. Petitioner is Not Precluded From Raising the Interplay Between §§ 761/762 and 764 DOHSA in Light of the Holding of the Court Below

As Respondent itself notes:

> "[I]t is well settled that an appellate court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *See, United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 446-48 (1993)" Opp. at 14.

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[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. Sec. 1502. Also known as "The Warsaw Treaty."

That statement is also applicable to the court below's power to apply the proper construction to all of DOHSA, including 46 U.S.C. App. § 764. Given the Court's direction in *Zicherman* that DOHSA applies to the wrongful death measures of damages, the court below retained the independent power to identify and apply the proper construction of governing law (i.e. all of DOHSA) but erroneously refused to do so.

As noted by the parties, after this court decided *Zicherman*, upon request by Korean Air Lines, the court below permitted the parties to submit supplemental briefs addressing the significance of *Zicherman* on the pending appeal (*See* Petition at 4; Opp. at 5). Petitioner argued in supplemental briefs that there was a right to recover damages under § 764 as a pass-through for application of South Korean law in addition to the damages permitted under §§ 761/62, just as Korean Air Lines argued the question of whether there was a legal right to assert a survival action for predeath pain and suffering. The court below improperly permitted Korean Air Lines to pursue its issue, but precluded Petitioner from doing the same with her issue. This Court has authority to address and decide the issue of the proper construction of DOHSA as applied through Article 17.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari in all respects set forth therein and reject the modifications of the issues for review suggested by Respondent.

Dated: November 14, 1996

Respectfully submitted,

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